Azahan bin Mohd Aminallah v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO C–09–13 OF 2000

GOPAL SRI RAM, HASHIM YUSOFF AND TENGKU BAHARUDIN SHAH JJCA

25 OCTOBER 2004

Criminal Procedure — Accused — Unrepresented accused — Whether mandatory for court to explain prosecution's case to unrepresented accused — Effect of such failure — Whether accused would be prejudiced by such failure — Criminal Procedure Code s 257(1)

Criminal Procedure — Accused — Unsworn statement from dock, by — Whether would constitute evidence — Whether unsworn statement by unrepresented accused would attract the operation of s257(1) Criminal Procedure Code

Criminal Procedure — Charge — Misjoinder of — Four offences of rape over a five-year period — Whether those four charges of rape could be jointly tried in a single trial — Whether such trial would constitute a nullity — Whether such trial would violate s 164 (1) Criminal Procedure Code — Criminal Procedure Code s 164

Criminal Procedure — Retrial — When to be ordered — Settled practice of appellate courts — Case pending against accused for eight years — Whether retrial ought to be ordered

Evidence — Similar facts — Admissibility — Balancing exercise by court — Whether probative value of similar fact evidence ought to be weighed against its prejudicial effect — Effect of court's failure to conduct such balancing exercise — Whether such failure would constitute a serious misdirection occasioning a serious miscarriage of justice

Evidence — Similar facts — Reference to past criminal acts — Rape trial — Evidence of previous sexual intercourse elicited from complainant during examination-in-chief by prosecutor without leave of court — Approach of court — Whether immediate judicial intervention warranted

Evidence — Witness — Examination-in-chief — Rape trial — Evidence of previous sexual misconduct of accused elicited by prosecutor from complainant during examination-in-chief — Noleave of court sought — Fresh rape charges preferred against accused as a consequence of such testimony — Whether such method of adducing evidence of previous sexual misconduct proper — Whether reflective of unsatisfactory and amateurish police investigation and prosecution

The appellant was first charged in the sessions court on 26 January 1997 with the rape of his 15-year-old daughter 'in early December 1996'. He claimed trial and the case was fixed for hearing on 8 January 1998. However, when the case was called on for trial on that date, the appellant applied for legal aid. The matter was then postponed to 24 June 1998. On 24 June 1998 the appellant applied for an adjournment as his counsel had not arrived. The court refused the adjournment and proceeded with the trial. His daughter — PW2 — the

prosecution's principal witness testified *inter alia* of several other incidents of sexual intercourse with the appellant sometime in 1991 and 1995. At the conclusion of the prosecution's case, in consequence of the evidence of PW2, the first charge against the appellant was amended and three other charges were framed against him. These charges were read to him but there was nothing in the record to show that the prosecution's evidence was explained to him pursuant to s 257 of the Criminal Procedure Code ('CPC'). The appellant was called to enter his defence. He chose to make an unsworn statement from the dock. However, the sessions court rejected the appellant's unsworn statement as a bare denial, convicted him on all four charges, and sentenced him to 18 years' imprisonment and two strokes of the rotan, on each charge. The appellant appealed to the High Court. The High Court merely endorsed the sessions court's findings and held there had been no procedural error by the trial court. The appellant thus appealed to the Court of Appeal.

Held, allowing the appeal and quashing the conviction:

(1) The method of adducing evidence of previous sexual intercourse from PW2 during her examination-in-chief was most unsatisfactory. It reflected poorly upon the way in which the case was handled in its pre-trial stages. It pointed to the original complaint by PW2 not having been thoroughly investigated by the police. Alternatively, the deputy public prosecutor entrusted with giving directions in the matter had completely overlooked the reference to other incidents in PW2's statement recorded under s 112 of the CPC. Were it otherwise, it was certain that the prosecution would have framed a charge in respect of each of the alleged incidents of rape. The way in which the trial proceeded gave an adverse impression that the case was being investigated into for the very first time in the course of the hearing. The Court of Appeal would strongly deprecate the unsatisfactory and amateurish way in which the case was handled by both the investigating agency and those in conduct of the prosecution (see paras 3 and 4).

(2) In the instant case, the appellant was tried for more than three offences of the same kind committed within the space of more than 12 months. He was in fact charged with committing four separate acts of rape over a period of five years. This constituted a violation of s 164(1) of the CPC. The trial of the appellant was thus a nullity and had to be quashed (see paras 10–13); *Subramania Iyer v King Emperor* LR 28 IA 257 and *Chin Choy v Public Prosecutor* [1955] MLJ 236 followed.

(3) The critical phrase in s 257(1) is 'elects to give evidence' and not 'elects to give evidence on oath'. The former phrase is wider than the latter and includes the making of an unsworn statement from the dock; *Ng Hoi Cheu v Public Prosecutor* [1968] 1 MLJ 53 followed. Thus the fact that the appellant elected to make an unsworn statement from the dock did not

exclude the operation of s 257(1) of the CPC. In the instant case, the failure of the sessions court to comply with s 257(1) of the CPC had seriously prejudiced the appellant. On the facts, it was incumbent upon the sessions court to discharge the function mandated by s 257(1) (see paras 17–19).

(4) This was a case where the appellant had come into court prepared to face a single charge. However, the prosecution in the course of the trial, without seeking the leave of the court, adduced highly prejudicial similar fact evidence of previous acts of sexual intercourse. The sessions court judge should have intervened at once and asked the prosecuting officer to justify the course he proposed to embark upon. This was especially necessary since the accused, a layman, was unrepresented by counsel (see para 20).

(5) A court when deciding whether to admit similar fact evidence must carry out a balancing exercise by weighing the probative value of such evidence against its prejudicial effect as impliedly required by ss 14 and 15 of the Evidence Act 1950. The court would be justified in admitting the evidence where its probative value is outweighed by its prejudicial effect (see paras 21 and 22); *Tan Meng Jee v Public Prosecutor* [1996] 2 SLR 422 followed.

(6) In the instant case, PW2's evidence as to the appellant's previous acts of intercourse with her was relevant, and admissible. However, this did not relieve the court of determining whether the probative value of her evidence outweighed its prejudicial effect. Nowhere in the judgment of the sessions court was there the kind of balancing exercise dictated by ss 14 and 15 of the Evidence Act. This was a serious misdirection and occasioned a serious miscarriage of justice (see paras 23 and 24).

(7) This was a case riddled with serious errors because of poor investigation and prosecution. Additionally, the sessions court failed to observe provisions of the CPC and the Evidence Act. This was not a proper case to order a re-trial. The appellant had already served seven years' imprisonment. Further, the original charge was in respect of an offence allegedly committed eight years ago (see paras 28 and 29).

[**Bahasa Malaysia summary**

Perayu pada mulanya dituduh di mahkamah sesyen pada 26 Januari 1997 kerana merogol anak perempuan beliau yang berumur 15 tahun 'awal bulan Disember 1996'. Beliau minta dibicarakan dan kes telah ditetapkan untuk perbicaraan pada 8 Januari 1998. Bagaimanapun, apabila kes dipanggil untuk perbicaraan pada tarikh tersebut, perayu memohon khidmat peguam. Perkara ini ditangguhkan kepada 24 Jun 1998. Pada 24 Jun 1998, perayu memohon

satu penangguhan kerana peguam beliau tidak hadir. Mahkamah enggan memberi penangguhan itu dan meneruskan perbicaraan. Anak perempuan beliau — PW2 — saksi utama pihak pendakwa, memberi keterangan mengenai antara lain, beberapa kejadian hubungan seksual dengan perayu sekitar tahun 1991 dan 1995. Di penutup kes pihak pendakwa, disebabkan keterangan PW2, pertuduhan pertama terhadap perayu dipinda dan tiga pertuduhan lain dibuat terhadap beliau. Pertuduhan tersebut dibaca kepadanya tetapi tiada apa-apa atas rekod yang menunjukkan bahawa keterangan pihak pendakwa telah dijelaskan kepadanya menurut s 257 Kanun Acara Jenayah ('KAJ'). Perayu dipanggil memberi pembelaan beliau.

Beliau memilih untuk membuat kenyataan tidak bersumpah dari kandang orang salah. Bagaimanapun, mahkamah sesyen menolak kenyataan tidak bersumpah beliau sebagai penafian kosong semata-mata, menyabitkan beliau atas keempat-empat pertuduhan tersebut, dan menjatuhkan hukuman penjara selama 18 tahun dan dua sebatan rotan ke atasnya, untuk setiap pertuduhan. Perayu merayu ke Mahkamah Tinggi. Mahkamah Tinggi hanya mengindorskan penemuan mahkamah sesyen dan memutuskan tiada kesilapan prosidural oleh mahkamah bawahan. Perayu oleh itu merayu ke Mahkamah Rayuan.

Diputuskan, membenarkan rayuan tersebut dan membatalkan sabitan:

(1) Cara mengemukakan keterangan hubungan seksual dahulu daripada PW2 sewaktu pemeriksaan utama beliau tidak memuaskan langsung. Ia menunjukkan ke sini telah dikendalikan dengan teruk di peringkat pra perbicaraan lagi. Ia menunjukkan aduan asal oleh PW2 yang disiasat dengan teliti oleh polis. Alternatifnya, timbalan pendakwa raya yang diberi kepercayaan untuk memberikan arahan dalam perkara ini telah terlepas perhatian berhubung kejadian lain dalam kenyataan PW2 yang telah direkodkan di bawah s 112 KAJ. Jika tidak, pastinya pihak pendakwa akan membuat pertuduhan untuk setiap kejadian rogol yang dikatakan itu. Cara perbicaraan dilaksanakan memberi gambaran bertentangan yang kes tersebut disiasat untuk kali pertama semasa perbicaraan. Mahkamah Rayuan mengecam sekeras-kerasnya cara yang tidak memuaskan dan tidak mahir di mana kes ini dikendalikan oleh kedua dua pihak penyiasat dan pendakwa (lihat perenggan 3 dan 4).

(2) Dalam kes semasa, perayu dibicarakan untuk lebih daripada tiga kesalahan yang sama jenis yang dilakukan dalam tempoh lebih 12 bulan. Beliau sememangnya dituduh melakukan empat perbuatan rogol yang berasingan dalam tempoh lima tahun. Ini membentuk perlanggaran s164(1) KAJ. Perbicaraan perayu oleh itu adalah tidak sah dan hendaklah dibatalkan (lihat perenggan 10–13); *Subramania Iyer v King Emperor* LR 28 IA 257 dan *Chin Choy v Public Prosecutor* [1955] MLJ 236 diikut.

(3) Frasa penting dalam s 257(1) adalah 'elects to give evidence' dan bukan 'elects to give evidence on oath'. Frasa pertama lebih luas daripada yang kedua dan termasuklah membuat kenyataan tidak bersumpah dari kandang orang salah; *Ng Hoi Cheu v Public Prosecutor*[1968] 1 MLJ 53 diikut. Oleh itu fakta bahawa perayu memilih untuk membuat kenyataan tidak bersumpah dari kandang orang salah tidak mengecualikan operasi s257(1) KAJ. Dalam kes semasa, kegagalan mahkamah sesyen mematuhi s 257(1) KAJ dengan seriusnya memprejudiskan perayu. Berdasarkan fakta, adalah penting untuk mahkamah sesyen melaksanakan fungsi yang dimandatkan oleh s 257(1) (lihat perenggan 17-19).

(4) Ini merupakan satu kes di mana perayu telah datang ke mahkamah bersedia untuk berhadapan dengan satu pertuduhan. Tetapi, pihak pendakwa semasa perbicaraan, tanpa memohon kebenaran mahkamah, telah mengemukakan keterangan fakta prejudis yang sama tentang perlakuan hubungan seksual yang lampau. Hakim mahkamah sesyen sepatutnya campur tangan dengan segera dan bertanyakan pegawai pendakwaan arah yang ingin dikecapi oleh beliau. Ini perlu memandangkan tertuduh, orang biasa, tidak diwakili oleh peguam (lihat perenggan 20).

(5) Mahkamah apabila memutuskan sama ada untuk menerima keterangan fakta sama (similar fact evidence) hendaklah melakukan satu latihan keseimbangan dengan menimbang nilai probatif keterangan tersebut berbanding dengan akibat prejudisnya seperti mana yang dikehendaki secara tersirat oleh ss 14 dan 15 Akta Keterangan 1950. Mahkamah dijustifikasikan dalam menerima keterangan di mana nilai probatif melebihi akibat prejudisnya (lihat perenggan 21 dan 22); *Tan Meng Jee v Public Prosecutor* [1996] 2 SLR 422 diikut.

(6) Dalam kes semasa, keterangan PW2 berhubung perlakuan hubungan seksual perayu dengannya adalah relevan, dan boleh diterima. Bagaimanapun, ini tidak melepaskan mahkamah daripada menentukan sama ada nilai probatif keterangan beliau mengatasi akibat prejudisnya. Penghakiman mahkamah sesyen tiada merujuk latihan keseimbangan yang dinyatakan oleh ss 14 dan 15 Akta Keterangan. Ini adalah satu salah arah yang serius dan merupakan kegagalan keadilan yang serius (lihat perenggan 23 dan 24).

(7) Ini satu kes yang penuh kesilapan serius kerana siasatan dan pendakwaan yang tidak dilakukan dengan teliti. Tambahan pula, mahkamah sesyen gagal meneliti peruntukan KAJ dan Akta Keterangan. Ini bukan satu kes yang sesuai untuk memerintahkan perbicaraan semula. Perayu telah pun menjalani hukuman penjara untuk tujuh tahun. Lagipun, pertuduhan asal adalah berhubung satu kesalahan yang dilakukan lapan tahun dahulu (lihat perenggan 28-29).]

Notes

For cases on misjoinder of charge, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 1253–1260.

For cases on reference to past criminal acts, see 7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2170–2173.

For cases on similar facts generally, see 7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2150–2182.

For cases on unrepresented accused, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 58 –64.

For cases on unsworn statement from dock by accused, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 65–68.

For cases on when to order retrial, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 2935–2938.

For cases on witness generally, see 7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2471–2671.

Cases referred to

Awaluddin bin Suratman & Ors v PP [1992] 1 MLJ 416 (refd)
Boardman v Director of Public Prosecutions [1975] 3 AC 421 (refd)
Chin Choy v PP [1955] MLJ 236 (refd)
Director of Public Prosecutions v P [1991] 2 AC 447 (refd)
Junaidi bin Abdullah v PP [1993] 3 MLJ 217 (refd)
Kiew Foo Mui v PP [1995] 3 MLJ 505 (refd)
Krishna Murthy v Abdul Subban [1965] 1 Cr LJ 565 (refd)
Lee Kwang Peng v PP [1997] 3 SLR 278 (refd)
Lokhman bin Abu v PP [2001] 1 MLJ 311 (refd)
Low Thim Fatt v PP [1989] 1 MLJ 304 (refd)
Manokaran v PP [1979] 1 MLJ 262 (refd)
Mohamed Din v PP [1985] 2 MLJ 251 (refd)
Ng Hoi Cheu v PP [1968] 1 MLJ 53 (folld)
Por Chop Aik v PP [1993] 2 MLJ 131 (refd)
PP v Teo Ai Nee [1995] 2 SLR 69 (refd)
PP v Sanassi [1970] 2 MLJ 198 (refd)
R v Police Commissioner of the Metropolis, ex p Blackburn (No 2) [1968] 2 QB 150 (refd)
R v Saunders (1974) 58 Cr App R 248 (refd)
R v Scarrott [1978] QB 1016 (refd)
Shaari v PP [1963] MLJ 22 (refd)
Subramania Iyer v King Emperor LR 28 IA 257 (folld)
Tan Foo Su v PP [1967] 2 MLJ 19 (refd)
Tan Meng Jee v PP [1996] 2 SLR 422 (folld)
Wong Heng Fatt v PP [1959] MLJ 20 (refd)

Legislation referred to

Criminal Procedure Code [Ind] ss 234(1), 537
Criminal Procedure Code ss 112, 164(1), 257, (1), 422
Emergency Regulations 1948 reg 4(1)(a)

Emergency Regulations 1951 regs 4(1)(b), 5(1)
Evidence Act 1950 ss 14, illustration (o), 15

Appeal from: Criminal Appeal No 42–07 of 1998 (High Court, Temerloh)

Mura Raju (Mura Raju & Co) for the appellant.

Tengku Amir Zaki bin Tengku Haji Abdul Rahman (Deputy Public Prosecutor) (Attorney General's Chambers) for the respondent.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] The appellant in this case was first produced before the sessions court at Temerloh on 26 January 1997 and charged as follows:

> That you in early December 1996, at about 8.30pm, in the oil palm estate, Jalan Highway Mentakab — Temerloh District of Temerloh, Pahang did rape a girl named Suriamizan bte Azahan KPT 810114–06–5246, aged 15 years. You have thereby committed an offence punishable under s 376 of the Penal Code.

[2] The appellant claimed trial to the charge and the court fixed 8 January 1998 for hearing. However, when the case was called on for trial on that date, the appellant applied for legal aid. The record shows that the matter was then postponed to 24 June 1998. On the appointed day the appellant who was present applied for an adjournment as his counsel who was apparently supposed to come from Raub had not arrived. The court refused the adjournment and proceeded with the trial. The accused did not therefore have the benefit of representation by a lawyer. In this context we pause to observe two matters. First, the appellant had been in police custody from the date of his arrest and in judicial custody from the date of his first production in court. Second, from the appellant's submission at the close of the prosecution case it appears that he was seen in prison by one Mr Phillip Loh, counsel assigned by the Legal Aid Bureau. The significance of these matters will appear later in this judgment.

[3] The principal witness for the prosecution (PW2) was the appellant's daughter, a 15 year old child. She gave evidence in chief of the incident that formed the subject matter of the charge. We must pause at this juncture to say that the notes of evidence have been poorly recorded. We have therefore encountered considerable difficulty in discerning portions of the evidence, particularly the cross-examination of PW2 by the appellant. However, it appears that in the course of her evidence in chief, the officer prosecuting the case must have asked her whether there had been previous incidents of sexual intercourse because we see from the record PW2 saying that there had been other incidents. She then referred to an incident in her grandmother's house in or about 1995, and other earlier incidents going back to 1991.

[4] This method of adducing evidence is most unsatisfactory. It reflects poorly upon the way in which the case was handled in its pre-trial stages.

Itpoints to the original complaint by PW2 not having been thoroughly investigated by the police. Alternatively, the deputy public prosecutor entrusted with giving directions in the matter had completely overlooked the reference to other incidents in PW2's statement recorded under s 112 of the Criminal Procedure Code ('the Code'). Were it otherwise, we are quite certain that the prosecution would have framed a charge in respect of each of the alleged incidents of rape. But the impression — and it is an adverse impression — that has been created by the way in which the trial proceeded is that the case was being investigated into for the very first time in the course of the hearing. We cannot deprecate in terms too strong the unsatisfactory and amateurish way in which this case was handled by both the investigating agency and those in conduct of the prosecution.

[5] To return to the narrative, at the conclusion of the prosecution's case, in consequence of the matters arising from PW2's evidence, four charges were framed against the appellant. This included the original charge marked as exh P11 which had been amended as to the time of the alleged incident. The four charges (marked from P11 through P14) are as follows:

The First Amended Charge (P11)

> That you in early December 1996, at about 2.30pm, in the oil palm estate, Jalan Highway Mentakab — Temerloh, in the District of Temerloh, Pahang did rape a girl named Suriamizan bte Azahan KPT 810114–06–5246, age 15 years. You have thereby committed an offence punishable under s 376 of the Penal Code

The Second Charge (P12)

> That you, on a Sunday in the year 1994, in the house No 137, Desa Murni, Sanggang in the district of Temerloh, Pahang, did commit an offence of rape on Suriamizan bte Azahan (KP No 810114–06–5246) age 13 years. You have thereby committed an offence punishable under s 376 of the Penal Code.

The Third Charge (P13)

> That you, on a Friday in the year 1996, at about 1.30pm, in the palm oil estate, KM22, Jalan Temerloh — Jerantut, in the District of Temerloh, Pahang, did commit an offence of rape on Suriamizan bte Azahan (KP No 810114–06–5246) age 15 years. You have thereby committed an offence punishable under s 376 of the Penal Code

The Fourth Charge (P14)

> That you, in 1991, in house No 32, Kampung Baru Sanggang, in the District of Temerloh, did commit an offence of rape on Suriamizan bte Azahan (KP No 810114–06–5246) age 10 years. You have thereby committed an offence punishable under s 376 of the Penal Code

[6] The record shows that these charges were read out to the appellant. However there is nothing to show that the prosecution's evidence was explained to the appellant as required by s 257 of the Code.

[7] To complete the narrative, when the court called on him to make his defence to the charge, the appellant elected to make an unsworn statement from the dock. In that statement he appears to have said that the case had been hoisted on him by his adulterous wife who had put the complainant up against him. We say 'appears' advisedly because the appellant's statement as recorded by the court is fragmented and rather brief. It also appears from the notes recorded by the court that it summarily rejected the appellant's unsworn statement as a bare denial. The court then convicted the appellant on all four charges and sentenced him to 18 years imprisonment and two strokes of the rattan on each charge. The appellant appealed to the High Court which merely endorsed the sessions court's findings and held that there had been no procedural error by the trial court.

[8] Before us, learned counsel for the appellant argued several grounds on which he said the conviction should be quashed. We find it unnecessary to deal with all of them.

[9] The main question in the present instance is whether the four charges were regularly tried. On this point s 164(1) of the Code is relevant. It reads:

> 164
>
> (1)When a person is accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offences, whether in respect of the same person or not, he may be charged with and tried at one trial for any number of them not exceeding three.

[10] The complaint here is that the appellant was tried for more than three offences of the same kind allegedly committed within the space of more than twelve months. The complaint is justified because the appellant was charged with committing four separate acts of rape over a period of five years. There has therefore been a violation of s 164(1) of the Code. The question that arises is this. What is the consequence of the breach? It is the unanimous view of the several decisions on the Indian equipollent of the section that the trial is a nullity. We find it unnecessary to discuss all the authorities here. Suffice that we mention two.

[11] In *Subramania Iyer v King Emperor* LR 28 IA 257, the appellant was charged with 41 acts extending over a period of two years. The Privy Council quashed the convictions and held that a breach of s 234(1) of the Indian Criminal Procedure Code 1898, (which is *ipsissima verba* our s 164(1)) is an illegality and not curable under s 537 (our s 422). Lord Halsbury LC said:

> Their Lordships are unable to regard the disobedience to an express provision as to a mode of trial as a mere irregularity. Such a phrase as irregularity is not appropriate to the illegality of trying an accused person for many different offences at the same time, and those offences being spread over a longer period than by law could have been joined together in one indictment. The illustration of the section itself sufficiently shows what was meant.

[12] *Subramania Iyer v King Emperor* was applied in *Chin Choy v Public Prosecutor* [1955] MLJ 236. In that case, the accused was charged with two offences of consorting contrary to reg 5(1) of the Emergency Regulations 1948, one offence of being in possession of a revolver contrary to reg 4(1)(a) of the Emergency Regulations 1951 and one offence of being in possession of ammunition contrary to reg 4(1)(b) of the Emergency Regulations 1951. The period which these offences covered was from 1948 to 1955. The accused pleaded guilty to two charges of consorting. Yet, the Court of Appeal of Malaya quashed the convictions on the possession charges and ordered a re-trial. Matthew CJ rejected the prosecution's contention that there had been a regular trial in the following passage:

> The learned deputy public prosecutor has submitted that, as a plea of guilty to the charges relating to consorting was accepted and a conviction recorded, the trial took place only as to the charges of possession, and to this joinder no exception can be taken. We do not agree. The appellant was required to plead to four charges which were wrongly joined, and the fact that he pleaded guilty to two of them does not cure the original illegality. Support for this view is to be found in *Krishmaswami Pillai v King-Emperor* 26 Mad 125.

> We accordingly quash the convictions, and order a re-trial as to the charges relating to possession contrary to regs 4(1)(a) and 4(1)(b) of the Emergency Regulations 1951.

[13] Applying these authorities to the present case, we are constrained to hold that the trial of the appellant was a nullity and must be quashed. The only question is whether a re-trial should be ordered.

[14] Strictly speaking, that should be the end of the matter. However, there are other aspects of this case, special to its facts that need to be addressed. One of these has to do with the failure of the sessions court to act in accordance with s 257(1) of the Code. The section is most relevant to this case because, as we have already pointed out in para 2 of this judgment the appellant was undefended by counsel. The section reads:

> At every trial before the court of a magistrate if and when the court calls upon the accused for his defence it shall, if he is not represented by an advocate, inform him of his right to give evidence on his own behalf, and if he elects to give evidence on his own behalf shall call his attention to the principal points in the evidence for the prosecution which tell against him in order that he may have an opportunity of explaining them.

[15] The first point to note about the section is that it has no parallel in either the Indian or the Singapore Criminal Procedure Codes. The second is that the section only casts a burden on the court if the accused — to quote the section — 'elects to give evidence'. The critical question at issue here is whether the appellant who elected to make an unsworn statement from the dock 'elected to give evidence'.

[16] Without going into the matter in any detail, it suffices for us to say that there is a conflict among the High Courts as to whether an unsworn statement from the dock is evidence. *Wong Heng Fatt v Public Prosecutor* [1959] MLJ 20, *Public Prosecutor v Sanassi* [1970] 2 MLJ 198, and *Low Thim Fatt v Public Prosecutor* [1989] 1 MLJ 304 say that it is not evidence. By contrast, Chang Min Tat J in *Ng Hoi Cheu v Public Prosecutor* [1968] 1 MLJ 53 held that it is evidence. And there are dicta in many other cases, Malaysian, Australian and at least one decided by the Privy Council which say quite emphatically that such an unsworn statement is evidence for the purposes of a trial. All the relevant cases may be found in two articles published in the Malayan Law Journal. The first is that by that very learned scholar Prof Ahmad Ibrahim in [1975] 2 MLJ vi. The other is by Professor Mohd Akram in [2003] 1 MLJ clxix.

[17] In our judgment, in the context of s 257(1) the critical phrase is 'elects to give evidence' and not 'elects to give evidence on oath'. The former is much wider than the latter and must ex necessitae rei include the making of an unsworn statement from the dock. We are therefore persuaded that the reasoning of Chang Min Tat J in *Ng Hoi Cheu v Public Prosecutor* is correct. Accordingly, the fact that the appellant elected to make an unsworn statement from the dock did not exclude the operation of s 257(1).

[18] The section has been considered by the High Court in a number of cases including, *Shaari v Public Prosecutor* [1963] MLJ 22, *Awaluddin bin Suratman & Ors v Public Prosecutor* [1992] 1 MLJ 416, *Por Chop Aik v Public Prosecutor* [1993] 2 MLJ 131 and by this Court in *Lokhman bin Abu v Public Prosecutor* [2001] 1 MLJ 311. In the last of these cases, we had the opportunity to observe that the failure to comply with section 257(1) 'would attract different consequences in each case, according to its own facts.' That is a view to which we adhere. The question is whether on the facts of the present case, the failure by the sessions court to comply with the section has seriously prejudiced the appellant. We think it has.

[19] This is a most serious case where the appellant was facing four charges at the end of the prosecution's case. Three of those charges came at the end of the case for the prosecution. In respect of some of these charges, there was, as we have already observed, insufficient particulars as to the date of the offence thereby wholly or substantially removing any possibility of a defence of alibi being raised by the appellant. In these circumstances, it was, in our view, incumbent upon the sessions court to discharge the function mandated by s257(1).

[20] Further, this was a case where the appellant had come into court prepared to face a single charge. However, the prosecution in the course of the trial had, without seeking the leave of the court, adduced highly prejudicial similar fact evidence of previous acts of sexual intercourse. Once the question was put as to previous acts, the normal course for the sessions court to have taken is to have intervened at once and asked the prosecuting officer to justify the course he proposed to embark upon. This was especially necessary since the accused, a layman, was unrepresented by counsel. We find this to be a most unsatisfactory feature of this case.

[21] A court when deciding whether to admit similar fact evidence must carry out a balancing exercise by weighing the probative value of such evidence against its prejudicial effect as impliedly required by ss 14 and 15 of the Evidence Act 1950. The court would be justified in admitting the evidence where its probative value is outweighed by its prejudicial effect. See *Boardman v Director of Public Prosecutions* [1975] 3 AC 421; *Director of Public Prosecutions v P* [1991] 2 AC 447; *Junaidi bin Abdullah v Public Prosecutor* [1993] 3 MLJ 217; *Public Prosecutor v Teo Ai Nee* [1995] 2 SLR 69; *Tan Meng Jee v Public Prosecutor* [1996] 2 SLR 422; *Lee Kwang Peng v Public Prosecutor* [1997] 3 SLR 278.

[22] In *Tan Meng Jee v Public Prosecutor* Yong Pung How CJ when delivering the judgment of the Singapore Court of Appeal said of the equipollent provisions in the Singapore Evidence Act:

> Be that as it may, we are of the opinion that the admission of similar fact evidence, at least for the purposes identified in ss 14 and 15 of the Evidence Act, should be governed by the balancing test adopted by the House of Lords in Boardman's case. Such an approach is warranted both in principle as well as on the wording of the legislation itself. As to the former, it has been argued above that the rationale of the rule excluding similar fact evidence is so that every person charged with an offence may only be convicted upon being proved to have committed the acts within the charge. It would be subverting established jurisprudence to allow a conviction based on the particular disposition of the accused — based on the contention that the accused is that type of person who would commit such an offence. On the other hand, there may be cases where the interest of justice clearly outweigh any prejudicial dangers inherent in the evidence.

[23] With respect we entirely agree with the aforesaid dictum, coming as it does from so authoritative a source as His Honour the Chief Justice of Singapore. Further, like His Honour, we also find illustration (o) to s 14 of the Evidence Act to be relevant. That Illustration reads:

> A is tried for the murder of B by intentionally shooting him dead. The fact that A on other occasions shot at B is relevant as showing his intention to shoot B. The fact that A was in the habit of shooting at people with intent to murder them is irrelevant.

[24] So, here too, PW2's evidence as to the appellant's previous acts of intercourse with her was relevant, that is to say, admissible. But that does not, on the authorities we have cited, relieve the court of determining whether the probative value of her evidence outweighed its prejudicial effect. We have carefully examined the record and nowhere in the judgment of the sessions court is there the kind of balancing exercise dictated by ss 14 and 15 of the Evidence Act. This is a serious misdirection. It occasioned a serious miscarriage of justice as the sessions court acted on the similar fact evidence to add three further charges against the appellant.

[25] In the context of the similar fact evidence in this case we find it useful to recall the words of Scarman LJ in *R v Scarrott* [1978] QB 1016:

> Positive probative value is what the law requires, if similar fact evidence is to be admissible. Such probative value is not provided by the mere repetition of similar facts; there has to be some feature or features in the evidence sought to be adduced which provides a link, an underlying link as it has been called in some of the cases. The existence of such a link is not to be inferred from mere similarity of facts which are themselves so commonplace that they can provide no sure ground for saying that they point to the commission by the accused of the offence under consideration.

[26] There is another unsatisfactory feature in this case. As we have said earlier, the appellant was unrepresented at the trial. The case had been adjourned only once before to enable him to engage counsel. On the second occasion he had asked for a postponement of the case once again to enable him to obtain legal representation. Considering the serious nature of the charge framed against him, we do not see what injury the justice system would have suffered if the sessions court had granted his request. As Raja Azlan Shah J (as he then was) said in *Tan Foo Su v Public Prosecutor* [1967] 2 MLJ 19, albeit in the context of granting an adjournment of a trial to enable the calling of a witness:

> Every latitude must be given to an accused person to defend his case and to call witnesses, more so when the accused person is not represented.

[27] When we put some of the several unsatisfactory features in this case to the learned deputy, he was unable to advance any argument in reply. His only response was that he left the matter to the court, a response described by Abdoolcader J in *Manokaran v Public Prosecutor* [1979] 1 MLJ 262 as:

> a supplication or formula or call it what you will which, with respect, has since become the stock answer and the standard and perhaps last refuge of the desperate.

[28] In the light of all the serious errors we have adumbrated it was clear that the appellant's conviction was unsafe and that that there had been occasioned a failure or miscarriage of justice. We pause now to remind ourselves of the approach of our courts to cases as the present by quoting the following passage from the judgment of Hegde J in *Krishna Murthy v Abdul Subban* [1965] 1 Cr LJ 565, which was applied with approval by the High Court in *Mohamed*

Din v Public Prosecutor [1985] 2 MLJ 251 and the Federal Court in *Kiew Foo Mui v Public Prosecutor* [1995] 3 MLJ 505:

> The expression 'a failure of justice has in fact occasioned thereby' found in s 535(1), Cr PC (which is s 422 of the Code) does not connote that the court should be of the opinion that an innocent person has been convicted or the case against the accused person is not made out beyond reasonable doubt. An accused person is entitled to be acquitted whether there was a fair trial or not if no case is made out against him. For that purpose the Legislature need not have introduced the conception of 'failure of justice' in ss 535 and 537, Cr PC. The 'failure of justice' mentioned therein is that occasioned by the contravention of the provisions in Chapter XIX, Cr PC. In law the expression 'justice' comprehends not merely a just decision but also a fair trial. Sections 535 and 537, Cr PC have primarily in view a fair trial. For the purpose of those sections a denial of fair trial is denial of justice. One of the contents of natural justice, which is so much valued, is the guarantee of a fair trial to an accused person. A fair trial is as important as a just decision. Neither the one nor the other can be sacrificed. Sacrifice of the one, in the generality of cases, is bound to lead to the sacrifice of the other. The two are closely interlinked.

[29] To sum-up, this is a case riddled with serious errors because of poor investigation and prosecution. Additionally, the sessions court failed to observe provisions of the Code and the Evidence Act. No suggestion was made by the learned deputy that a re-trial should be ordered. In any event, we do not consider this to be a proper case to order a re-trial. The appellant had already served seven years imprisonment. In accordance with the settled practice of appellate courts, re-trials are generally not ordered in cases where the case has been pending against an accused for about four years. See *R v Saunders* (1974) 58 Cr App R 248. The original charge was in respect of an offence allegedly committed eight years ago. A re-trial is therefore not appropriate on the facts of this case.

[30] We would add this postscript. This judgment does not break new ground. It merely applies settled principles of law to the particular and peculiar facts of this case. It certainly does not establish the proposition that a charge wanting of a specific date is bad and warrants an acquittal. This court is certainly not responsible for any erroneous misapprehension to the contrary in the minds of persons who have not read this judgment. As members of an independent judiciary it does not behove us to answer each and every unwarranted or misinformed criticism of our decisions or judgments. We must by the very nature of our office remain silent at any and all brickbats hurled at us. We may only seek vindication for our decisions through our reasoned judgments. Asthe great Lord Denning MR said in *R v Police Commissioner of the Metropolis ex parte Blackburn (No 2)* [1968] 2 QB 150:

> All we would ask is that that those who criticise us will remember that, from the nature of our office, we cannot reply to their criticisms. We cannot enter into public controversy. Still less into political controversy. We must rely on our conduct itself to be its own vindication. Exposed as we are to the winds of criticism, nothing which is said by this person or that, nothing which is written by this pen or that, will

deter us from doing what we believe is right; nor, I would add, from saying what the occasion requires, provided that it is pertinent to the matter in hand. Silence is not an option when things are ill done.

[31] For the reasons already given the appeal was allowed, the conviction quashed and the sentence set aside.

Appeal allowed. Conviction quashed.

Reported by John Paul Simon